STATE OF MICHIGAN

COURT OF APPEALS

JEFF RICHARDS, Plaintiff-Appellant,	UNPUBLISHED March 11, 2004
v	No. 242502 Kalamazoo Circuit Court
METRON INTEGRATED HEALTH SYSTEM, Defendant-Appellee.	LC No. 01-000397-CZ

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendant. We affirm.

Plaintiff was employed by defendant as the head of environmental services for its nursing home facility in Kalamazoo, Metron of Kalamazoo.[1] Plaintiff's tenure was relatively brief and this dispute arises from his termination. According to plaintiff, he was terminated because he threatened to report the MK facility administrator, Victor Glassford, either to defendant or to the state for patient abuse (apparently referring to an incident he observed before his employment with defendant while visiting the facility while working for an ambulance company) and for stating that he would contact the fire marshal with regards to his concerns regarding the electrical system and door locks. Defendant maintains that plaintiff was terminated due to poor job performance, including the failure to follow budgets, lack of supervision, and inconsistent attendance. Shortly after he was terminated, plaintiff did file a complaint regarding alleged code violations with the Department of Consumer and Industry Services. He also filed the instant action alleging a violation of the Whistleblowers' Protection Act, MCL 15.361 *et. seq.*, and Michigan public policy.

[1] Metron of Kalamazoo, or MK, is reportedly a separate corporate entity and there was an issue in the trial court whether plaintiff had sued the proper defendant. However whether Metron Integrated Health System or MK should have been named as the defendant is not before us in this appeal and for purposes of this appeal we will regard defendant as plaintiff's employer.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), concluding that plaintiff had not established a causal connection between his alleged protected activity and his termination, that it was undisputed that plaintiff was discharged for failing to perform his duties, that it was undisputed that plaintiff had not made any reports to a regulatory agency before his dismissal, nor was there clear and convincing evidence that he was about to do so, and that the Whistleblowers' Protection Act preempted plaintiff's public policy claim.

Plaintiff first argues that the trial court erred in concluding that there was no genuine issue of material fact on the issue that plaintiff could not show that he was about to report a violation of law as required by MCL 15.363(4). We disagree. Once the moving party has shown support for its position that there is no genuine issue of material fact, the nonmoving party has the burden of showing the existence of a genuine issue of material fact to resolve at trial. In making this determination, the evidence is viewed in the light most favorable to the nonmoving party. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997).

The Whistleblowers' Protection Act provides protection for those employees who are "about to" report wrongdoing, but are discharged before they are able to do so. But the further removed the employee is from making the report, the less protection there is under the act. See *Shallal, supra* at 613. Thus, the question becomes whether there is clear and convincing evidence that the employee was on the verge of making a report. *Id.* at 612-613. We agree with the trial court that plaintiff is unable to make such a showing in the case at bar.

According to plaintiff's deposition testimony, he made four threats to report defendant. First, at the time of his hiring in January 2001, he threatened to report defendant (at the time plaintiff's potential employer) for what he had observed while working for the ambulance company, again in March (after he was hired) concerning his belief that the facility did not have an adequate number of nurses, again in April concerning the bridge unit and electrical problems, and then finally two days before he was fired when he "refreshed Glassford's memory" as to his concerns with the nursing staff, electrical problems, and the alleged taking of ceiling tiles.

Even viewing this evidence in the light most favorable to plaintiff, we do not see plaintiff being able to meet his burden of showing by clear and convincing evidence that he was about to report defendant to a public body. First, with respect to the reporting threat made during the initial interview, plaintiff indicated that his intent was to report the matter to his superiors at the ambulance company, not to a government body. Similarly, the threat regarding the report on ceiling tiles being taken was a threat to report the administrator to defendant, not to a public body. While the other threatened reports were arguably to be made to a public body, there is no indication that plaintiff was actually about to make such reports, but was merely using the threats to force action on his complaints by the administrator. Indeed, plaintiff even stated, with respect to the nursing staffing issue, that he left his meeting with Glassford feeling "somewhat content" that Glassford was going to handle the issue.

In short, there is no indication that plaintiff intended to actually make the reports, only that he was using the threat of reporting to gain leverage with his supervisor. Accordingly, we are satisfied that summary disposition was appropriate on this basis.

Because of our resolution of the above issue, we need not consider whether plaintiff has established a genuine issue of material fact that there was a causal connection between protected activity under the act and his termination. But it does remain necessary to consider the issue whether the act preempts plaintiff's claim that his termination was contrary to public policy. On this issue, the trial court properly granted summary disposition because a public policy claim is not sustainable for whistleblowing activity. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993).

Affirmed. Defendant may tax costs.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello